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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-656

JOHN ANTHONY MASIELLO,
JOHN A. MASIELLO, JR.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Questions Presented 2

Statement of the Case 4

Reasons for Granting the Writ 12

I. Where the Government Conducted a Half-Year's Investigation of the Accused, Resulting in a Detailed 19 Count Indictment, Providing Specific and Particular Information Concerning the Few Checks Relevant to the Indictment Charges, the Government's Subsequent Warrantless General Seizure of a Mass of Nearly 20,000 Cancelled Business Checks From the Accused's Business Offices as an Incident to the Arrest of an Indicted Defendant Found on the Premises Violated the Accused's Fourth Amendment Rights, Especially When the Government Prearranged at the Time of the Indictment to Not Obtain a Search Warrant, But to Obtain Arrest Warrants, Instead, and Make a Search and Seizure of the Accused's Business Records Incident to Any Arrest of an Indicted Defendant They Might Be Able to Make at the Business Premises 13

PAGE

II. Under Fourth Amendment Requirements, in a Warrantless Search Incident to a Lawful Arrest, Government Agents May Only Seize Evidence of Crime and Not Likely Sources of Admissible Evidence as Held by the Court of Appeals 23

III. The Court of Appeals Denied Petitioners Due Process and the Effective Assistance of Counsel When, After Ordering a Remand Hearing on the Principal Appellate Issue of the Denial of Petitioners' Pre-Trial Motion to Suppress Evidence, It Failed to Review the New and Relevant Evidence Produced at the Remand Hearing and When It Failed to Give Petitioners' Counsel the Opportunity to Expand the Record on Appeal on the Basis of the Remand Evidentiary Hearing and Present Additional Argument Relevant to the New Record Before Making Its Decision on the Merits of the Appeal 27

CONCLUSION 32

APPENDIX A—Opinion of the United States Court of Appeals Dated October 28, 1970 ..... 1a

APPENDIX B—Opinion of the United States Court of Appeals Dated July 21, 1971 ..... 5a

APPENDIX C—Order of the United States Court of Appeals 8a

APPENDIX D—Constitutional and Statutory Provisions Involved 9a

Table of Authorities

PAGE

Cases:

Agnello v. United States, 269 U.S. 20 (1925) 15

Barnard v. United States, 342 F.2d 309 (9 Cir. 1965) .. 29
Berger v. New York, 388 U.S. 41 (1967) 20
Boyd v. United States, 116 U.S. 616 (1886) 24

Caroll v. United States, 267 U.S. 132 (1925) 15
Chimel v. California, 395 U.S. 752 (1969) 13, 15, 16, 18
Clarke v. Neil, 427 F.2d 1322 (6 Cir. 1970) 26
Cole v. Arkansas, 333 U.S. 196 (1947) 30
Coolidge v. New Hampshire, —— U.S. ——, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) 14, 15, 18

Douglas v. United States, 239 F.2d 52 (D.C. Cir. 1957) 29
Draper v. United States, 358 U.S. 307 (1959) 16-17

Escobedo v. Illinois, 378 U.S. 478 (1964) 16

Frank v. Mangum, 237 U.S. 309 (1914) 30
Frazier v. Cupp, Warden, 394 U.S. 731 (1968) 26
Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1967) 26

Gouled v. United States, 255 U.S. 298 (1921) 24, 25

Harris v. United States, 331 U.S. 145 (1947) 16
Hemphill v. United States, 402 F.2d 187 (D.C. Cir. 1968) 29
Henderson v. United States, 425 F.2d 134 (5 Cir. 1970) 29
Hill v. California, —— U.S. ——, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971) 14, 16, 26

PAGE

Katz v. United States, 389 U.S. 347 (1967) 14
Kremen v. United States, 353 U.S. 346 (1957) 14

Marron v. United States, 275 U.S. 192 (1927) 15, 16
Massiah v. United States, 377 U.S. 201 (1964) 16
McDonald v. United States, 335 U.S. 451 (1948) 14
McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950) 21

Schmerber v. United States, 384 U.S. 757 (1966) 17
Shorey v. Warden, 401 F.2d 474 (4 Cir. 1968) 26
Stanley v. Georgia, 394 U.S. 557 (1968) 26
Stone v. United States, 385 F.2d 713 (10 Cir. 1967) 26

United States v. Alloway, 397 F.2d 105 (6 Cir. 1968) .. 26
United States v. Bennett, 409 F.2d 885 (2 Cir. 1969) ..25, 26
United States v. Lefkowitz, 285 U.S. 452 (1931) 22
United States v. McKendrick, 409 F.2d 181 (2 Cir. 1969) 26
United States v. Rabinowitz, 339 U.S. 56 (1949) 17, 18

Vale v. Louisiana, 399 U.S. 30 (1970) 17, 18

Warden v. Hayden, 387 U.S. 294 (1967) 14, 15, 20, 24, 25, 27
Williams v. United States, —— U.S. ——, 28 L. Ed. 2d 388, 91 S. Ct. 1148 (1971) 14

Constitutional Provisions:

United States Constitution
Fourth Amendment 2, 3, 12, 13, 14, 16, 20, 23, 24, 28, 30
Fifth Amendment 2, 3, 12, 16, 31
Sixth Amendment 2, 3, 12, 16, 30, 31

PAGE

Statutes:

18 U.S.C. §201(b) 2, 4
18 U.S.C. §371 2
18 U.S.C. §3231 2
28 U.S.C. §1254(1) 2

Rule:

Federal Rules of Appellate Procedure, Rule 11 30

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JOHN ANTHONY MASIELLO,
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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming their criminal convictions.

OPINIONS BELOW

The first opinion of the Court of Appeals remanding to the United States District Court for the Southern District of New York is reported at 434 F.2d 33. The second opinion of the Court of Appeals affirming the judgment of the District Court is reported at 445 F.2d 1324.

JURISDICTION

The first opinion of the Court of Appeals remanding to the District Court was filed October 28, 1970, and is set forth in Appendix A. The second opinion of the Court of Appeals, affirming the judgment of the District Court, was filed July 21, 1971. This opinion is set forth in Appendix B. The Court of Appeals denied a petition for rehearing and rehearing en banc on September 16, 1971; its orders are set forth in Appendix C. The time for filing of this petition was extended until November 15, 1971 by order of Justice Marshall, entered October 13, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was based on 18 U.S.C. §3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Fourth, Fifth, and Sixth Amendments to the United States Constitution.

(2) 18 U.S.C. §§371 and 201(b).

These provisions are set forth in Appendix D to this Petition.

QUESTIONS PRESENTED

1. Whether a warrantless general seizure by federal government agents of nearly 20,000 cancelled corporation checks from an accused's corporation offices on the basis of a search incident to the lawful arrest of a corporation employee found on the premises is violative of accused's Fourth Amendment rights when:

(a) prior to the search and seizure the government has completed a half-year's investigation of the accused and obtained a detailed 19-count indictment against the accused and others, including the arrested corporation employee, providing the government with particular descriptions of the five or six specific checks constituting the principal evidence supporting the charges in the indictment involving check payments, and when

(b) after the indictment is returned, despite their ability to particularly describe the few checks supporting the charges in the indictment, federal agents, acting under the supervision of an assistant United States attorney, choose not to apply for a search warrant, but obtain only arrest warrants and go to accused's business offices with a prearranged plan to conduct a search as an incident to any lawful arrest they might be able to make within the premises?

2. Whether an accused's Fourth Amendment rights are violated when a mass of 20,000 cancelled corporation checks, not identified on inspection by government agents as evidence of crime, are seized without a search warrant in accused's corporation offices by the agents as a likely source of admissible evidence of crime, incident to a lawful arrest of a corporation employee made on the premises?

3. Whether an accused's Fifth and Sixth Amendment rights are violated when a Court of Appeals after ordering a remand evidentiary hearing on the government's conduct in a search and seizure of accused's records, which produces an extensive new record of relevant credible evidence, fails to review this new evidence and does not afford defense an opportunity to expand the record on appeal,

based on the remand evidentiary hearing, and to present additional argument, orally or by brief, before making its decision on the appeal and filing its opinion affirming the conviction based solely on a misleading and incomplete report of the remand hearing judge?

STATEMENT OF THE CASE

Petitioners, father and son, were each convicted of one count of conspiracy to violate 18 U.S.C. §201(b) which prohibits bribery of public officials. Petitioner John Anthony Masiello was also convicted of six counts of violating 18 U.S.C. §201(b) and Petitioner John A. Masiello, Jr. was convicted of three counts of violating 18 U.S.C. §201(b). Petitioner John Anthony Masiello was sentenced to terms of five years imprisonment on each count to run concurrently and to pay a fine in the sum of $15,000.00. Petitioner John A. Masiello, Jr. was sentenced to terms of imprisonment of 3 years on each count to run concurrently and to pay a fine in the sum of $5,000.00. Petitioners were tried jointly with the A.N.R. Leasing Corporation, in which they were stockholders, severances having been granted to Thomas A. McKeever, Isadore Kihl, Joseph A. Maisto and Michael Albanese, listed as defendants in the indictment. Another defendant named in the indictment, Andrew Daly, withdrew his plea of not guilty, and entered a plea of guilty to one count of conspiracy, and was sentenced to two years probation and a fine in the sum of $1,050.00.

Defendants Kihl, Daly, Maisto and Albanese were federal postal officials holding various supervisory positions in the Motor Vehicle Operations Unit which concerned itself with the movement of the mails by vehicle services

to various areas of the City of New York. (Tr. 28, 64, 71)[1] The Petitioners and defendant McKeever through the A.N.R. Corporation held contracts with the Motor Vehicle Operations Unit for the leasing of trucks and trailers to this unit. In essence the prosecution alleged a conspiracy by these seven men and the corporation to give and receive bribes in the form of cash payments, free Florida hotel vacations and other gifts for the purpose of assuring that Petitioners' corporation would receive special favors and keep its leasing contracts with the post office.

The most significant documented evidence relating to the conspiracy and bribery charges against Petitioners involved the payment of Florida hotel bills for Kihl, Maisto and Albanese by checks of the A.N.R. Corporation and another related corporation at the instance of Petitioners and a downpayment on an automobile for another postal official of the Motor Vehicle Operations Unit, Michael Dimasi,[2] by means of a check of the A.N.R. Corporation signed by John A. Masiello, Jr.[3] These cancelled checks (Gov. Exs. 8, 9, 10, 11 and 12; Tr. 173, 185) were introduced in evidence against Petitioners over defense objec-

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[1] In this Statement of the Case references to the trial transcript are cited as "Tr. ____". References to the first opinion of the Court of Appeals are cited as "OA. ____" and to the second opinion of the Court of Appeals as "OB. ____". References to the remand evidentiary hearing in the District Court are cited as "R.H. ____".

[2] Dimasi was not named in the indictment as a defendant and the indictment included no reference to this payment.

[3] The government relied principally on the testimony of Michael Daley and representatives from the Florida hotel and the automobile agency which sold Dimasi's car. Daley was indicted as a co-conspirator and had pled guilty, receiving a sentence of two years probation. Thus, he was a corrupt source of evidence and highly suspect as a reliable witness. The other witnesses could produce only circumstantial evidence. The checks, themselves, however, were the most damaging evidence against Petitioners since they directly established the payments charged in the indictment.

tion on the ground that they were the subject of an illegal search and seizure. (Tr. 174). They had been included among 20,000 cancelled business checks seized en mass without a warrant, on March 19, 1969, and carried away by government agents from the offices of A.N.R. Corporation (Tr. 174; R.H. 34-36, 108). This seizure was made as an incident to the lawful arrest of McKeever, an employee of A.N.R. Corporation, who had entered the business premises shortly before the government agents conducted their raid (R.H. 200).

A pre-trial motion to suppress the seized evidence was denied by District Judge Palmieri without a hearing on July 1, 1969 (OA. 3a). On the basis of an affidavit presented by Petitioners describing the nature and scope of the search and seizure to the Court of Appeals, on appeal from the conviction, the Court of Appeals remanded the case to the District Court for an evidentiary hearing on the motion to suppress and a report back to it, while it continued to retain jurisdiction over the appeal. (OA. 4a)

On February 19 and 22, 1971 the remand hearing on the motion to suppress was held by the District Court trial judge producing a transcript of 245 typewritten pages. After the hearing the District trial judge filed a report opinion which in effect reaffirmed the denial of Petitioners' motion to suppress the evidence. *United States* v. *Masiello, et al.,* 330 F. Supp. 1269 (S.D.N.Y. 1971). This report was filed, June 22, 1971, in the Court of Appeals. The Court of Appeals affirmed Petitioners' convictions on July 21, 1971 on the basis of the report (OB. 5a-7a) without affording defense counsel an opportunity to file with it the expanded record created by the remand evidentiary hearing and to present arguments, either orally

or by brief, against the position taken by the District Court based on the expanded record.

The Court of Appeals acted unilaterally upon the receipt of the report of the District Court, without having before it the new factual record provided by the remand hearing it, itself, had ordered.[4] Yet the facts uncovered by this remand hearing are the very crux of this Petition.

On the basis solely of the testimony of the government witnesses, who were credited by the District trial judge,[5] the remand hearing revealed the following pertinent facts which were substantially ignored in the report which the District Court filed with the Court of Appeals.

The arrest of McKeever in the offices of the A.N.R. Leasing Corporation, which was used by the government agents as a basis to seize without a warrant the 20,000 cancelled checks, took place after a lengthy and careful government investigation of Petitioners, McKeever, and a number of federal postal officials, lasting at least six months, and after the United States Attorney, as a result of this investigation, had accumulated sufficient evidence, both testimonial and documentary, to obtain on March 19, 1969, a 19-count detailed indictment charging Petitioners and others with conspiracy and bribery.[6] (R.H. 7, 8, 17, 28).

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[4] The docket entries in the Court of Appeals record only the filing of the report of the District Court judge and not the transcript of the remand hearing.

[5] This Petition relies only on the government's testimony at the remand hearing consistent with the District Court's finding only the government witnesses to be credible and the reliance of the Court of Appeals on the District Court's determination of the credibility of witnesses. In the one exception where defense testimony is referred to, this testimony only supplemented the government testimony and is not in conflict with it.

[6] Petitioners were actually tried on another indictment obtained subsequent to the search of Petitioners' business offices. Although

During the course of the six month investigation leading up to the indictment, government agents had obtained complete and particular knowledge of all the check payments from Petitioners' business operation made for the benefit of specifically identified federal postal officials. These particular check payments were the subject of individual counts in the indictment and constituted the only evidence of check payments presented at the trial. These payments, which constituted the most damaging evidence against Petitioners, related to the Miami Beach, Florida hotel bills for three postal officers, defendants Kihl, Maisto, and Albanese and to the downpayment for an automobile for another postal official, Michael Dimasi.

Concerning the hotel bills, government agents had obtained, prior to the indictment, records of these transactions from the Montmartre Hotel in Miami Beach, Florida, the location of the vacation visits of the three postal officials. The government's principal witness at the remand hearing, Postal Inspector O'Neil, specifically admitted this fact in replying to the Assistant United States Attorney's questions on direct examination:

> "Q. And prior to March 19, 1969 [the date of the first indictment], had you checked with the Montmartre Hotel in Florida with respect to any such payments? A. Yes.
>
> "Q. And had you obtained records from them relating to visits by people named Kihl, Maisto and Albanese to the Montmartre Hotel, which had been paid by A.N.R. or a related company? A. Yes." (R.H. 17, 18)

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this indictment contained additional counts, it was not the product of any new evidence obtained as a result of the search. The first indictment was just as specific concerning the information possessed by the government prior to the search and seizure challenged by Petitioners. (R.H. 67, 68)

As early as January, 1969, two months before the indictment, government investigators had visited the Montmartre Hotel in Florida and had inspected the exact hotel records concerning the visits of Kihl, Maisto and Albanese and the payments of their hotel bills. They had arranged for the hotel to send xerox copies of these records to the postal authorities in New York conducting the investigation. Postal Inspector O'Neil supplied this information during his cross examination as follows:

> "Q. Somebody from your department had gone and visited the Montmartre Hotel, right? A. Yes, sir.
>
> "Q. And they came back with xerox copies of the records of the Montmartre Hotel? A. No. I think they mailed them back to me.
>
> "Q. When were they in your possession prior to March 19, 1969? A. Definitely prior to March 19, 1969. I can't give the exact date but several months prior to that time.
>
> . . .
>
> I really think we had them in January of 1969 because there was a great commotion about inspectors going to Florida in the winter time, so I am pretty sure it was January 1969, that we got them back." (R.H. 62, 63)

These xeroxed copies of records, of which the originals of some were admitted in evidence at the trial as government exhibits 5, 6, and 7 (Tr. 138) contained detailed information as to hotel visits by the postal official defendants, including the dates of reservation, the check in and check out dates and the dates the bills were paid out and who paid them (Tr. 138-147). Indeed, the testimony of Postal Inspector O'Neil at the remand hearing, established that the government had even obtained a photostatic copy of at least one of the specific corporation checks sent by

Petitioners to the Montmartre Hotel in payment of one of the bills specified in the indictment. (R.H. 18).

With regard to Dimasi's car, the government investigators had learned prior to the indictment that Dimasi had put up a $1,000.00 downpayment on a new car and that after the A.N.R. postal contract had been cancelled one of the Petitioners was overheard telling the other to "stop payment on Dimasi's car." (R.H. 20).

Thus, when the indictment of March 19, 1969, was returned by the grand jury, the only documentary evidence in Petitioners' possession that the government needed to support the charges in the indictment were the few checks referred to above. It is clear from the remand hearing that the government agents had specific information as to the date and payee of each check to the Florida hotel. From the thoroughness of the investigation, there can be little doubt that the agents also had such knowledge concerning the Dimasi car payment. Having questioned Dimasi (R.H. 20), they must have known when the car was purchased and from what automobile agency, and would have had access to the records they needed to pinpoint the check.

This, then, is the posture of the government's position on the basis of its own testimony with regard to its knowledge of the relevant documentary evidence in Petitioners' possession on March 19, 1969 before they raided Petitioners' corporation offices on the basis of arrest warrants. Moreover, government testimony at the remand hearing reveals additional critical information relevant to the issues raised by this Petition which is not found in the report of the District trial judge and which therefore could not have been considered by the Court of Appeals.

Postal Inspector O'Neil, who was in charge of the investigation of Petitioners, testified that based on discussions

he had on the day the indictment was returned and possibly two or three days before that day, with the assistant U.S. Attorney who secured the indictment, it was planned that postal agents would obtain arrest warrants and go to the business offices of Petitioners for the purpose of searching for the checks and other records related to the indictment, and "whatever else might have been involved", as an incident to any arrest they might be able to make on the business premises. Postal Inspector O'Neil's testimony, on direct examination, concerning this prearrangement was as follows:

> "Q. Did you have any conversation with Assistant United States Attorney Zirin before the arrest on the subject of whether or not, were anyone arrested at A.N.R., any documents could be seized? A. Yes.
>
> "Q. And specifically what did you discuss with Assistant United States Attorney Zirin on that subject? A. The discussion was concerned with the probability, or if someone in the indictment was at 149th Street, that we would look for and search for A.N.R. records relative to automotive payments, or motor vehicle payments, and any checks which would indicate payments for postal employees on trips or vacations, *or whatever else may have been involved.*
>
> "Q. When had you had such discussions with United States Attorney Zirin? A. Some of it on the morning that the indictment was returned, possibly two or three days before that, at or about our last conference." (R.H. 21, 22) (emphasis supplied).

Indeed, Inspector McFadden, who was under the supervision of Postal Inspector O'Neil, testified at the remand hearing that on March 19, 1971, prior to the return of the indictment, O'Neil had instructed him to drive his car to Petitioners' corporation offices in advance of the other agents and to wait there until the others arrived (R.H.

105). McFadden testified that he expected to engage in a search of the business offices and seize records at the time of any arrest and that he carried with him three large empty cartons in his car in case they would be needed (R.H. 115). According to the government testimony at the remand hearing, these cartons were in fact needed and were used to carry away large quantities of Petitioners' business records. With regard to the quantity of records seized, the remand hearing revealed that the government agents (who had arrived at the A.N.R. offices in three cars (R.H. 231)) called for a station wagon to carry away the papers seized—the post office sent a truck. (R.H. 45, 46).

Postal Inspector O'Neil testified at the remand hearing that he either did not discuss or could not recall discussing with the assistant U.S. Attorney in charge of the grand jury the question of obtaining a search warrant and that, in fact, he did not seek to obtain one. (R.H. 70-73).

REASONS FOR GRANTING THE WRIT

This case raises novel, important and timely questions concerning the Fourth Amendment requirement of prior judicial authority for a search and seizure decided by the Court of Appeals in a way in conflict with applicable decisions of this Court; the compatability with the Fourth Amendment of the Court of Appeals' extending this Court's ruling permitting the warrantless seizure of "mere evidence" of crime incident to a lawful arrest to include the seizure of a "likely source of admissible evidence"; and the incompatability with the Fifth and Sixth Amendments of the Court of Appeal's failure to review credible new and crucial evidence produced at a remand hearing ordered by the Court of Appeals on the issue of the denial without a

hearing of a pre-trial motion to suppress evidence and the failure of the Court of Appeals to give defense the opportunity to present argument on the basis of this new record before rendering its decision on the appeal over which it had retained jurisdiction.

I.

Where the Government Conducted a Half-Year's Investigation of the Accused, Resulting in a Detailed 19 Count Indictment, Providing Specific and Particular Information Concerning the Few Checks Relevant to the Indictment Charges, the Government's Subsequent Warrantless General Seizure of a Mass of Nearly 20,000 Cancelled Business Checks From the Accused's Business Offices as an Incident to the Arrest of an Indicted Defendant Found on the Premises Violated the Accused's Fourth Amendment Rights, Especially When the Government Prearranged at the Time of the Indictment to Not Obtain a Search Warrant, But to Obtain Arrest Warrants, Instead, and Make a Search and Seizure of the Accused's Business Records Incident to Any Arrest of an Indicted Defendant They Might Be Able to Make at the Business Premises.

This is a case of first impression before this Court involving a warrantless search and seizure of a massive number of cancelled business checks as a likely source of admissible evidence of a federal crime under the pretext of a search incident to a lawful arrest, after the investigative process had terminated and the Petitioners had been indicted. That this case is governed by standards applicable prior to the ruling in *Chimel* v. *California*, 395 U.S. 752 (1969) is not relevant. The questions presented by this

Petition are completely different from those resolved by this Court in *Williams* v. *United States,* —— U.S. ——, 28 L. Ed. 2d 388, 91 S. Ct. 1148 (1971) and in *Hill* v. *California,* —— U.S. ——, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971). The basic question raised here is not the spacial scope of such a search incident to lawful arrest, or the contents scope of such a search under the ruling of this Court in *Kremen* v. *United States,* 353 U.S. 346 (1957). Rather it is whether under the factual circumstances of this case there could be any search at all without a search warrant.

This court has repeatedly stated the rule mandated by the history and language of the Fourth Amendment that a search without prior judicial authority is unreasonable *per se* unless it falls within certain carefully drawn exceptions based on exigent circumstances. *McDonald* v. *United States,* 335 U.S. 451 (1948); *Warden* v. *Hayden,* 387 U.S. 294 (1967); *Katz* v. *United States,* 389 U.S. 347 (1967). Recently, in *Coolidge* v. *New Hampshire,* —— U.S. ——, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), the Court again emphasized this principle, stating:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the 4th Amendment—subject only to a few specifically established and well delineated exceptions.' The exceptions are 'jealously and carefully drawn.' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made the course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors

> of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases, in an urban and industrial world, the changes have made the values served by the 4th Amendment more, not less, important." (footnoted citation of authorities omitted) 29 L. Ed. at 576, 91 S. Ct. at 2032.

As noted by this Court in *Coolidge,* the few exceptions to the warrant requirement for a search recognized by this Court have been based on exigent circumstances such as (1) the probable cause search of a moving vehicle (*Caroll* v. *United States,* 267 U.S. 132 (1925)); (2) the probable cause search in hot pursuit of a felon (*Warden* v. *Hayden,* 387 U.S. 294 (1967)); and (3) a search incident to a lawful arrest, (*Agnello* v. *U.S.,* 269 U.S. 20 (1925); *Marron* v. *U.S.,* 275 U.S. 192 (1927)).

The instant case confronts only one of the recognized exceptions to the search warrant requirement—the search incident to a lawful arrest. It is submitted that this exception rests on exigent circumstances no less than the others. This was pointed out by Mr. Justice White in his dissenting opinion in *Chimel.*

> "The only issue is whether a search warrant was required as a pre-condition to that search. It is agreed that such a warrant would be required absent exigent circumstances. I would hold that the fact of an arrest supplies such an exigent circumstance, since the police have lawfully gained entry to the premises to effect the arrest and since delaying the search to secure a warrant would involve the risk of not recovering the fruits of the crime." 395 U.S. at 781.

Indeed, in the cases in which this Court has upheld a search and seizure incident to a lawful arrest, exigent circumstances were always present[7] and they involved pre-indictment searches and seizures, while the investigative process was still underway.[8] See *Marron* v. *United States, supra* (crime committed in presence of officers and seizure made to prevent destruction of evidence); *Harris* v. *United States,* 331 U.S. 145 (1947) (to prevent destruction of evidence and government property); *Draper* v. *United States,*

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[7] The two basic exigencies often pointed to by this Court in its decisions upholding a search incident to a lawful arrest in cases prior to *Chimel* are the safety of the arresting officer and the potential destruction of evidence. This Court in *Chimel* found that these two exigencies could be met by restricting the warrantless search to the area within the physical control of the person arrested. Nevertheless, in a case judged by pre-*Chimel* standards, such as the instant case, there still must be present these same exigencies, even though the spacial scope allowed the officers to meet them is much broader. See *Hill* v. *California,* —— U.S. ——, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971).

[8] Of course, it is not suggested that searches incident to a lawful arrest may not be made after the completion of the investigative process and the return of an indictment. The obvious exigency in such a case would be the protection of the officer's safety, allowing the search for a weapon. Plain view seizures of contraband or evidence of crime should also not be affected by the stage in which the case is in at the time of arrest. But it is submitted that a warrantless search for mere evidence *after an indictment has been returned* would require some special exigency justification, which was clearly not present in the instant case. This Court has provided different standards when the case has left the investigative and reached the post indictment stage. *Massiah* v. *United States,* 377 U.S. 201 (1964). Mr. Justice Stewart, dissenting in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) stated that his position would have been different if there had been an indictment because "under our system of criminal justice the institution of indictment . . . marks the point at which a criminal investigation has ended and adversary litigation proceedings have commenced." Although these cases dealt with Sixth and Fifth Amendment rights, their application to Fourth Amendment rights would appear valid under the factual circumstances revealed at the remand evidentiary hearing in the instant case where the indictment did in fact mark the point in which the criminal investigation ended.

358 U.S. 307 (1959) (to protect safety of officers and prevent destruction of evidence); *Schmerber* v. *United States*, 384 U.S. 757 (1966) (to prevent the loss of evidence); *United States* v. *Rabinowitz*, 339 U.S. 56 (1949) (to permit officers flexibility in a fast moving investigation as to when and how to "close the trap" in an on-going criminal activity and to prevent destruction of evidence).

Petitioners contend that the instant case is separate and distinct from all of the cases in which this Court has upheld a search incident to a lawful arrest. Absent completely here are any exigent circumstances. To the contrary arrest warrants used by the government agents were employed primarily as search instruments in a calculated effort to take advantage of an exception to the warrant requirement narrowly drawn by this Court to provide "some flexibility [for] law officers engaged in daily battle with criminals." *Rabinowitz, supra* 339 U.S. at 65. In two recent analogous cases in a different context, this Court has insisted that search warrant procedures be followed in situations where the officers planned in advance to make a search for evidence and had appeared or had ample time to appear before a judge to obtain arrest warrants. In *Vale* v. *Louisiana*, 399 U.S. 30 (1970), the arrest was made outside the premises which were subsequently searched. Holding that these circumstances precluded a warrantless search of the premises, this Court in its opinion emphasized the officers' prearrangement to conduct a search as a basis for their finding that a search warrant was required. The Court stated:

> "The officers were able to procure two arrest warrants for the appellant's arrest. They also had information that he was residing at the address where they found him. There is no reason, so far as anything before us appears, to suppose that it was impractical for

them to obtain a search warrant as well." 399 U.S. at 35

In *Coolidge* v. *New Hampshire, supra,* the police had reason to believe that a specific automobile had been used in the rape-murder of a 14-year old girl. After a careful and extended investigation, the police decided to arrest the owner of the automobile and to seize the automobile. They obtained an arrest warrant for Coolidge and a search warrant for the automobile. However this Court found the search warrant illegal, because it had not been issued by an independent judicial officer.

Reviewing the seizure of the automobile as a warrantless one, where no exigent circumstances existed, Mr. Justice Stewart, for the majority of the Court restated the legal principle so pertinent to the instant case:

> "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it . . . [t]he requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as '*per se* unreasonable' in the absence of 'exigent circumstances.'" 29 L. Ed. at 585, 91 S. Ct. at 2040

Thus, this is not a case of passing on whether law officers made the right decision in proceeding by an arrest warrant rather than a search warrant to "close the trap" in a quickly developing investigation of "a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony" as in *Rabinowitz.* Nor is it an example of the exigent circumstances supplied by the *fact* of the arrest referred to by Mr. Justice White in his dissenting opinion in *Chimel, supra.*

The instant case, to the contrary, involved an investigation lasting a half year, resulting in a detailed 19 count indictment (R.H. 7, 8, 17, 28), where the government agents had acquired all of the particular knowledge they needed to specifically identify in an affidavit for a search warrant, the few checks relevant to support specific and detailed charges in the indictment months before they raided Petitioners' business offices under the pretext of making an arrest (R.H. 17, 18, 62, 63). Prior to that raid, the principal government witness at the remand hearing admitted he had the pre-planned intention to make an exploratory search of Petitioners' business premises without a search warrant, and as an incident to any arrest they might be able to make on the premises with arrest warrants issued on the basis of the indictment. (R.H. 21, 22)

The government agents sought to explain their proceeding by arrest warrants after the indictment had been returned on the ground that one of the Petitioners had been convicted some years ago of smuggling and that the other was under indictment on a charge of assault. (R.H. 11, 12)[9] However, they surely had this information months before the indictment when they had already accumulated more than sufficient evidence from their investigation to obtain arrest warrants for Petitioners. If they believed it was necessary to arrest Petitioners for the purpose of placing them under some constraints, they could have easily done so at least two months prior to their raid of Petitioners' business offices, and at the same time could have obtained a search warrant to seize the specific checks of which they had detailed knowledge.

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[9] This explanation avoids the main question—it provides no reason why the officers could not have also obtained a search warrant when they were before the judge obtaining arrest warrants.

It is submitted that the government agent's explanation for proceeding by arrest warrant after the indictment was nothing more than a sham, and that what the government planned to do, as the principal government witness so testified at the remand hearing, was to engage in a search of Petitioners' business premises upon receipt of the indictment using an arrest warrant as the vehicle for such a search, rather than comply with the Fourth Amendment requirement of obtaining a search warrant. One need not speculate as to the government's strategy. Under the charges of the indictment, and the information they had from their investigation, they could particularly describe only five or six checks which were the subject of the pertinent indictment charges. A search warrant for such checks would, of course, be restricted and would be confined, as it properly should, to the particular things to be seized under the charges in the indictment. See *Berger* v. *New York,* 388 U.S. 41 (1967).

However it is clear from the testimony of the government witnesses at the remand hearing, that they preferred to engage in an exploratory search of all of the cancelled business checks possessed by Petitioners covering the four-year period of the conspiracy charge for the purpose of engaging in a fishing expedition to learn whether Petitioners had been involved in any other criminal conduct with postal officers. (R.H. 21, 22). This they were not entitled to do. *Cf. Warden* v. *Hayden, supra.*

Further insight into the government's strategy in its raid of Petitioners' business offices based solely on arrest warrants is provided by Postal Inspector O'Neil's instruction to Inspector McFadden to "go up to 149th Street [Petitioners' offices] and wait for them [the other agents] to come", given prior to the return of the indictment and

the securing of arrest warrants. (R.H. 105) O'Neil's instruction to McFadden is unexplainable, unless McFadden was to act as a "spotter" for any indicted defendant entering the offices. That he may have served this purpose is indicated by his informing O'Neil, when O'Neil arrived, that he had "seen John Masiello, Sr. at the window of a restaurant across the street from the Masiello offices" (R.H. 23), and the testimony at the remand hearing that the raiding party entered the offices shortly after McKeever, the defendant actually arrested on the premises, had arrived in the office (R.H. 200).

A timed arrest of an accused for the purpose of apprehending him when he is in the premises the law enforcement officers wish to search, when the accused could have readily been apprehended at a different time and place, presents a constitutional bar to a search incident to such an arrest. *McKnight* v. *U.S.*, 183 F.2d 977 (CA DC 1950). Speaking directly to the use of such a timed arrest as a means of making a search of the premises incident to it, Judge Edgerton stated in *McKnight*:

> "We think this a plain violation of the prohibition in the Fourth Amendment of the Constitution against unreasonable searches and seizures. The government argues that what it aptly calls a 'police strategem', waiting until McKnight was in the locked house before arresting him justified the police in breaking into the house in order to arrest him and seize evidence. We think this untenable." 183 F.2d at 978

Postal Inspector O'Neil testified that when he arrived at the Petitioners' offices he did not know who was inside. (R.H. 23) Had the Court of Appeals reviewed the testimony produced at the remand hearing it may have decided that the record did not support O'Neil's statement, despite

its adherence, in general, to the rule that the credibility of the witnesses is a matter for the hearing judge to determine.

The Court has clearly indicated that a search incident to an arrest may not be broader than that which would be permitted by a search warrant based on the knowledge in the possession of the government agents. *United States* v. *Lefkowitz,* 285 U.S. 452 (1931). The resultant seizure by the government agents of 20,000 checks when they could only lawfully search for and seize five or six checks that were relevant to the charges covered by the indictment makes the intention of the raiding government agents abundantly clear. The deception perpetrated by the government agents is manifestly demonstrated by the testimony of Postal Inspector O'Neil at the remand hearing where he testified that he seized the 20,000 checks after he had begun to look through some of them and decided "there were so many checks that I just gave up." (R.H. 58).

In light of the fact that the same government agent had testified at the same hearing that months before the indictment he had obtained xerox copies of the exact Florida hotel records relating to the hotel bill payments which were the basis of the principal charges against Petitioners (R.H. 17, 18, 62), and that he had even obtained at least one photostatic copy of one of the checks (R.H. 18), his statement that he had to seize the entire 20,000 checks because of any difficulty in finding what he was looking for is incredible on its face. He need not have bothered with 20,000 checks—he could have readily gone directly to the checks of the specific dates in his possession, made out to the particular payee hotel he knew about from his investigation. Indeed as to one of the checks, he could have quickly found it by means of its number, since he had a photostatic copy of the check (R.H. 18).

It is especially significant that the District trial judge, who presided over the remand hearing and heard the testimony relating to the government investigation and the information the government agents had, omitted any reference to this evidence in his report to the Court of Appeals. Worse, even, he reinforced the argument of the government that it needed to seize all of the 20,000 checks by quoting in his report opinion to the Court of Appeals Postal Inspector O'Neil's patently incredible excuse for not seizing the specific checks of which he had particular knowledge. (330 F. Supp. at 1271). This distortion of the evidence by the District trial judge in his report becomes especially crucial to this Petition, again because the Court of Appeals did not have the transcript of the evidentiary remand hearing before it when it affirmed the convictions on the basis of the District Court's report.

II.

Under Fourth Amendment Requirements, in a Warrantless Search Incident to a Lawful Arrest, Government Agents May Only Seize Evidence of Crime and Not Likely Sources of Admissible Evidence as Held by the Court of Appeals.

Even on the basis of the government's theory that the government agents in the instant case could make a warrantless search of Petitioners' business premises incident to the lawful arrest of McKeever, under no valid application of the rulings of this Court could they seize the mass of 20,000 checks. When inspected by the agents at the time of seizure, this large quantity of cancelled business checks contained in 12 cartons was not recognized or determined by the agents to be evidence of any federal crime.

The Court of Appeals justified the seizure of these checks and the other business records on the ground that they were "*likely sources* of admissible evidence of crime." (OB. 6a) (emphasis supplied). In so holding, it is respectfully submitted that the Court below misapplied the rulings of this Court relating to a warrantless seizure of "mere evidence" incident to a lawful arrest. This Court has stressed that all that can be seized in such a case is *evidence* of crime, not "likely sources" of evidence. *Cf. Warden* v. *Hayden, supra.*

Indeed, prior to *Warden* v. *Hayden*, 387 U.S. 294 (1967), it was the consistent position of this Court that the only items that could be validly seized under a search warrant, or in the exceptional case of a warrantless search incident to a lawful arrest, were those things which the government had a paramount right to possess, such as contraband instruments of the crime, or stolen goods. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Gouled* v. *United States*, 255 U.S. 298 (1921).

In *Warden* this Court abandoned the property concept of search and seizure supported by *Gouled* and emphasized that the Fourth Amendment protects privacy rather than property. Thus, the Court authorized the seizure of "mere evidence" of crime provided the other requirements of the Fourth Amendment are met.

But this Court in *Warden*, in expanding the right of law enforcement officers to seize "mere evidence" of crime, did not permit the much broader search and seizure of *likely sources* of admissible evidence of crime which was expressly approved by the Court of Appeals in affirming Petitioners' convictions. Indeed, in *Warden*, the permitted seizure was only of the clothes which matched the descrip-

tion of those worn by the fleeing robber, not of a mass of clothes which would be a "likely source" of finding the clothes worn by the robber.

In rejecting the "instrumentality" concept, the Court in *Warden* recognized that its new "mere evidence" rule presented the problems of a broader search involving greater invasions of privacy than were possible under the *Gouled* rule. But since the Court's ruling applied only to *actual evidence* of crime the Court considered this not to be of real concern, stating:

> "The requirements of the 4th Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must of course be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." 387 U.S. at 306[10]

Subsequent to *Warden* in cases involving the seizure of mere evidentiary items, as distinguished from contraband, instrumentalities or the fruits of crime, this Court and lower federal courts have only upheld the seizure of items identifiable as evidence of crime. A number of these cases, similar to *Warden* involved the warrantless seizure incident to a lawful arrest of specific items or clothing which had been described or identified prior to or at the time of the seizure and which directly related to identifying the accused as being involved in the crime charged. See e.g.

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[10] The Court below in an earlier opinion in *United States* v. *Bennett*, 409 F.2d 885, 897 (CA. 2 1969), per Judge Friendly, at least recognized that the boundary of the "mere evidence" rule set forth in *Warden* awaited "elaboration by the Court."

Frazier v. *Cupp, Warden*, 394 U.S. 731 (1968); *Stone* v. *United States*, 385 F.2d 713 (CA. 10 1967); *United States* v. *Alloway*, 397 F.2d 105 (CA. 6 1968); *Shorey* v. *Warden*, 401 F.2d 474 (CA. 4 1968); *Fuller* v. *United States*, 407 F.2d 1199 (CA. DC 1967); *United States* v. *McKendrick*, 409 F.2d 181 (CA. 2 1969); *Clarke* v. *Neil*, 427 F.2d 1322 (CA. 6 1970). It is noteworthy that in the recent case of *Hill* v. *California, supra*, the seizure of "mere evidence" approved by this Court involved 2 pages of a diary which the officers recognized as evidence of the crime charged. They did not seize the entire diary."[11]

Of special significance is the language in a concurring opinion in *Stanley* v. *Georgia*, 394 U.S. 557, 569 (1968). The item seized was a role of film—analogous in the instant case to the mass of 20,000 checks. Rejecting the validity of the seizure of this film as evidence of crime, Justice Stewart joined by Justices White and Brennen, stated:

> "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity or criminal evidence in plain view. For the record makes clear that the content of the films could not be determined by mere inspection" 394 U.S. at 571.

Clearly, therefore, the mass of 20,000 cancelled business checks, which could not by "mere inspection" be determined to be evidence of crime by the government agents at the

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[11] In *United States* v. *Bennett*, 409 F.2d 888, 897 (CA. 2 1969), Judge Friendly, using the analogy of a diary, expressed a position consistent with that of Petitioners' here, and contrary to the Per Curiam opinion in the case of the Court below in which he joined:

> "The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I Have Performed.'"

time of their seizure, could not be seized under the "mere evidence" rule of *Warden* v. *Hayden, supra.* The effort of the Court below to extend *Warden* to seizures of "likely sources of admissible evidence" is not supported by any ruling of this Court, but on the contrary directly conflicts with this court's stated purpose in *Warden* to restrict the seizures to only relevant *evidence* of the crime charged.

III.

The Court of Appeals Denied Petitioners Due Process and the Effective Assistance of Counsel When, After Ordering a Remand Hearing on the Principal Appellate Issue of the Denial of Petitioners' Pre-Trial Motion to Suppress Evidence, It Failed to Review the New and Relevant Evidence Produced at the Remand Hearing and When It Failed to Give Petitioners' Counsel the Opportunity to Expand the Record on Appeal on the Basis of the Remand Evidentiary Hearing and Present Additional Argument Relevant to the New Record Before Making Its Decision on the Merits of the Appeal.

The principal issue raised by Petitioners on appeal was the denial without a hearing of their pre-trial motion to suppress, challenging the warrantless seizure of a mass of 20,000 cancelled corporation checks and other business records from their corporation offices. Unaware of the factual background of this search and seizure because of the denial of a hearing, Petitioners' counsel restricted their argument on appeal to the spacial and content scope of the warrantless search of the offices and the massive seizure of business records. On the basis of an affidavit submitted by an employee of Petitioners concerning the scope of the search and seizure, the Court of Appeals ordered a remand

evidentiary hearing on the search and seizure issue to be conducted by the trial judge. The Court of Appeals retained jurisdiction over the appeal and ordered the District trial judge to report back to it after the hearing. (OA. 4a).

On the basis of the testimony of the government witnesses, which the trial judge found credible, new and crucial evidence was produced raising the issues discussed in Argument I of this Petition (p. 13). Of course, the Court of Appeals had not had an opportunity prior to the remand hearing to review these new facts and issues any more than did Petitioners' counsel.

Despite this new evidence, the trial judge found no violation of Fourth Amendment rights in the search and seizure conducted by the government agents and wrote a report opinion to the Court of Appeals which excluded any reference to the extensive evidence produced at the hearing which Petitioners consider essential to their Fourth Amendment question on appeal. To the contrary, the trial judge in his report opinion endorsed the reasons presented by the government agents concerning why they proceeded by arrest warrants alone, despite the patent sham of their action (330 F. Supp. at 1270). The trial judge also reinforced the government's chief witnesses' explanation of why he found it necessary to seize the mass of 20,000 checks by quoting this explanation with approval in his opinion even though he had heard other testimony of this same witness which made that explanation incredible on its face (330 F. Supp. at 1271).

Thus the Court of Appeals was only made aware of the Government's testimony concerning the scope of their search and seizure through the report opinion and was

left in the dark concerning the new and critical facts raising issues which could not have been presented to it during the appeal preceding the remand hearing. In reviewing the report opinion of the trial judge, the Court of Appeals is quite right in stating that the issue of credibility of the witnesses is for the trial judge to determine. But the Court of Appeals cannot avoid the responsibility of deciding whether the credible evidence supported the findings of the trial judge on the facts and the law. *Cf. Douglas* v. *United States,* 239 F.2d 52 (CA D.C. 1957); *Barnard* v. *United States,* 342 F.2d 309 (CA 9 1965); *Hemphill* v. *United States,* 402 F.2d 187 (CA D.C. 1968); *Henderson* v. *United States,* 425 F.2d 134 (CA 5 1970).

Because of the extent of the new evidence, producing a transcript of 245 typewritten pages, Petitioners' counsel was fully confident they would have an opportunity to file a supplemental appendix, additional briefs and present oral argument to the Court of Appeals after it received the remand report. Counsel stated to the Court of Appeals in the Petition for a Rehearing and for a Hearing en Banc that he had been informed by a clerk of the Court of Appeals that "in view of the fact that additional evidence had been adduced pursuant to the mandate of this Court at an evidentiary hearing upon a motion to suppress evidence, that a brief and record of such evidentiary hearing could be submitted to this Court and that no decision would be rendered until such an opportunity had been afforded." (Appellants' Petition for Rehearing, p. 2) Indeed, Petitioners' counsel and an assistant United States Attorney were in the midst of discussing the content of the supplemental appendix, when the Court of Appeals filed its opinion affirming the conviction on the basis of the remand report alone.

Thus Petitioners have been denied their due process rights to a full appellate review of their principal issue on appeal and the effective assistance of counsel to present the fundamental questions raised by the remand evidentiary hearing concerning the violation of Petitioners' Fourth Amendment rights.

It is untenable that a remand evidentiary hearing believed necessary by the Court of Appeals to resolve an important appellate issue, which produces an extensive new record, is of no relevance to the Court of Appeals in making its final decision. Certainly, where a Court of Appeals has taken jurisdiction over an appeal involving a substantial issue of law, and finds that it lacks a sufficient evidentiary record to resolve that issue, requiring it to remand the case for an evidentiary hearing, basic concepts of due process and Sixth Amendment rights should impose a duty on the Court of Appeals to have the expanded record brought before it and to afford counsel the opportunity to argue any new issues or facts which were produced by the remand hearing. *Cf. Frank* v. *Mangum,* 237 U.S. 309, 327 (1914); *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1947).

There appears to be no federal decisional or statutory law or rule of court providing any guidelines for the protection of these rights today. A random inquiry made of a number of clerks of Courts of Appeals in different circuits indicates that in some circuits Rule 11 of the Federal Rules of Appellate Procedure has been informally applied for the purpose of having the remand hearing record certified up to the Court of Appeals. It appears to be the general practice that where substantial issues are involved and the remand hearing produces an extensive record of new evidence, as occurred in the instant case,

the Court of Appeals makes some provision for the expansion of the record on appeal based on the remand hearing and affords counsel the opportunity to argue the new facts and issues.

This should clearly be the rule generally consistent with Fifth and Sixth Amendment rights. The present absence of any rules dealing with procedures following the ordering by a Court of Appeals of a remand evidentiary hearing leaves the protection of an appellant's right to effective assistance of counsel up to the whim of an individual panel of a Court of Appeals. It also results in a lack of uniformity throughout the circuits on a matter that should be treated the same way by every circuit, regardless of its size or particular needs and problems.

It is respectfully submitted that, in the instant case, this Court should at least remand this case to the Court of Appeals for the purpose of permitting a full appellate review of the issues raised by Petitioners' which are based on the Government's testimony adduced at the remand hearing. Such a remand should include an expansion of the record on appeal to include the relevant portions of the transcript of the remand hearing and the opportunity for counsel to present argument, either orally or by brief, on the new facts and issues.

Since the Federal Rules provide no guidelines concerning the procedures which should follow a remand evidentiary hearing, this Court might consider for the purpose of future cases, and the achievement of uniformity, the reference of this matter to the Judicial Conference for the development of appropriate rules to aid the Courts of Appeals in each of the circuits.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals Dated October 28, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97—September Term, 1970.

(Argued September 15, 1970 Decided October 28, 1970.)

Docket No 34769

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN ANTHONY MASIELLO, JOHN A. MASIELLO, JR.,

Defendant-Appellants,

THOMAS A. McKEEVER, ISIDORE KIHL, a/k/a GEORGE KIHL, ANDREW DALY, JOSEPH A. MAISTO, MICHAEL ALBANESE and A.N.R. LEASING CORPORATION,

Defendants.

Before:

FRIENDLY, SMITH and HAYS,

Circuit Judges.

Appeal from judgment and sentence following conviction on trial to the jury in the United States District Court for the Southern District of New York, Morris Lasker, *Judge,* on charges of conspiracy and bribery of public officials in violation of 18 U.S.C. §§371 and 201(b). Remanded for hearing on the reasonableness of a search and seizure.

IRVING ANOLIK, New York, N.Y. (Abraham H. Brodsky, New York, N.Y. of counsel), *for Defendant-Appellants.*

EDWARD M. SHAW, Assistant U.S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York and Robert G. Morvillo, Assistant U.S. Attorney, of counsel), *for Appellee.*

PER CURIAM:

Defendant appellants, John Anthony Masiello and John A. Masiello, Jr., father and son, are shareholders in A.N.R. Leasing Corporation, an organization which leased trucks and trailers to both private corporations and the Post Office Department. They were convicted in the District Court for the Southern District of New York before Morris Lasker, *Judge,* and a jury, of conspiracy and bribery of public officials, in violation of 18 U.S.C. §§371 and 201(b). We remand to the District Court for a hearing on the reasonableness of the search and seizure involved in this case, retaining jurisdiction of the appeal.

The Masiellos, one McKeever, also an officer of A.N.R. Leasing Corporation, the corporation itself and a number of postal officials were indicted on charges of conspiring to defraud the United States, giving and accepting bribes and giving and accepting gratuities. Although the Masiellos were arrested away from the corporate headquarters, McKeever was taken into custody by federal officers possessing a warrant for his arrest while at the offices of A.N.R. In a search and seizure incident to that arrest, the officers seized a quantity of records, including canceled

checks introduced in evidence on the trial of appellants a ' A.N.R. Leasing Corporation to establish payments to or for postal officials. A pre-trial motion to suppress was denied by Judge Palmieri without a hearing. The checks were introduced into evidence over appellants' objection. There exist considerable discrepancies in the affidavits of the government officers and an A.N.R. official as to what took place in the course of the search and seizure. Since a hearing was denied in the District Court, all factual assertions of the affidavit submitted on behalf of appellants must be assumed to be correct for the purpose of this appeal. It is apparently not disputed that A.N.R.'s office consisted of more than one room and that files were searched and records seized in one or more rooms other than the one in which McKeever was arrested. Although this search would be clearly unlawful under the standards established by the Supreme Court in *Chimel* v. *California*, 395 U.S. 352 (1969) the search took place before *Chimel* and therefore the applicable fourth amendment standards are those existing prior to that decision. *United States* v. *Bennett*, 415 F.2d 1113 (2d Cir. 1969).

If the facts are as alleged by the affidavit in support of appellants' motion to suppress those standards have been violated. It has been claimed that extensive portions of the enormous amounts of material seized have no possible relevance to the case at hand. It was further alleged that the federal officers conducted "a general rummage of the suite and a wholesale seizure of the files and records contained therein." If these characterizations of the facts are accurate the activities of the federal officers could hardly be considered consistent with the requirements of the fourth amendment. See *Von Cleef* v. *New Jersey*, 395 U.S. 814 (1969) (per curiam); *Kremen* v. *United States*, 353 U.S. 346 (1957) (per curiam).

We therefore conclude that a hearing should be held and findings be made below on the extent and reasonableness of the search and seizure and remand to request that Judge Lasker conduct such a hearing and report. We meanwhile retain jurisdiction of the appeal.

HAYS, *Circuit Judge* (concurring in the result):

I concur in the result but I do not subscribe to the opinion that "the search would be clearly unlawful under the standards established by the Supreme Court in *Chimel* v. *California* . . . " See *United States* v. *Pino*, F.2d (2d Cir. 1970) [Slip Op. No. 4141 Aug. 17, 1970]; *United States* v. *Lozaw*, 427 F.2d 911 (2d Cir. 1970).

APPENDIX B

Opinion of the United States Court of Appeals Dated July 21, 1971

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97—September Term, 1970.

(Submitted June 22, 1971 Decided July 21, 1971.)

Docket No. 34769

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN ANTHONY MASIELLO, JOHN A. MASIELLO, JR.,

Appellants.

Before:

FRIENDLY, *Chief Judge,*
SMITH and HAYS, *Circuit Judges.*

Appeal from judgment and sentence following conviction on trial to the jury in the United States District Court for the Southern District of New York, Morris Lasker, *Judge,* on charges of conspiracy and bribery of public officials, in violation of 18 U.S.C. §§371 and 201(b). Affirmed.

IRVING ANOLIK, New York, N. Y. (Abraham H. Brodsky, New York, N. Y., of counsel), *for Appellants.*

EDWARD M. SHAW, Assistant U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York and Robert G. Morvillo, Assistant U. S. Attorney, of counsel), *for Appellee.*

PER CURIAM:

Defendant appellants, John Anthony Masiello and John A. Masiello, Jr., father and son, are shareholders in A.N.R. Leasing Corporation, an organization which leased trucks and trailers to both private corporations and the Post Office Department. They were convicted in the District Court for the Southern District of New York before Morris Lasker, *Judge,* and a jury, of conspiracy and bribery of public officials, in violation of 18 U.S.C. §§371 and 201(b). They were acquitted on "gratuity" counts. We find no error and affirm the convictions.

We remanded this case to the District Court with a request that Judge Lasker conduct a hearing on the reasonableness of the search and report thereon. 434 F.2d 33. The hearing was held and report made.

Judge Lasker made findings as to the extent of the search and found the search reasonable under the standards prevailing prior to *Chimel* v. *California,* 395 U.S. 752 (1969). While the area searched involved several office rooms and a large quantity of material was seized, it was confined to a search for and seizure of likely sources of admissible evidence of the crime, consisting of canceled checks and check stubs, a cash receipts and disbursements book for the period in question, truck and vehicle payment records and a purchase order book. Judge Lasker credited the government agents and the detailed inventory given and properly de-

clined to credit conflicting testimony that a great amount of additional material was taken. Credibility was of course a matter for the judge to determine, and his conclusion that the search and seizure were reasonable on the facts found was clearly correct.

We find no merit in the other issues raised on appeal. There was sufficient evidence for the jury to infer a corrupt intent to obtain special advantage from the payments to officials in charge of the government end of the Masiello contracts.

We have considered the "gratuity" count a lesser included offense of the bribery count; there was therefore no inconsistency in the charges. *United States* v. *Irvin*, 354 F.2d 192, 196 (2d Cir. 1965); *United States* v. *Polansky*, 418 F.2d 444, 446 (2d Cir. 1969).

The charge that the corporation could not be found guilty unless one of the Masiellos was guilty is properly interpreted as reference to the necessity of the corporation acting through a natural person, here on the facts necessarily one of the Masiellos. Even if there was a possible agent in McKeever, no harm to the appellants is shown.

The judgment is affirmed.

APPENDIX C

Order of the United States Court of Appeals

34769

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN ANTHONY MASIELLO, *et al,*
Defendants,

JOHN ANTHONY MASIELLO and JOHN A. MASIELLO, JR.,
Defendants-Appellants.

A petition for a rehearing or in the alternative a motion to stay the issuance of the mandate having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied. Mandate is stayed pending application for certiorari subject to the provisions of Rule 41 (b) Federal Rules of Appellate Procedure.

HENRY J. FRIENDLY
J. JOSEPH SMITH
PAUL R. HAYS
Circuit Judges

September 16, 1971

APPENDIX D

Constitutional and Statutory Provisions Involved

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

18 U.S.C. §201(b) provides in pertinent part:

> "(b) Whoever, directly or indirectly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or . . . [S]hall be fined not more than $20,000 or three times the monetary equivalent of the thing in value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States."

18 U.S.C. §371 provides in pertinent part:

"If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-656

JOHN ANTHONY MASIELLO, JOHN A. MASIELLO, JR.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 1a-4a) remanding the case to the district court for a hearing is reported at 434 F.2d 33. The opinion of the district court on remand is reported at 330 F. Supp. 1269, and is annexed as an Appendix hereto (Gov't App.). The *per curiam* opinion of the court of appeals (Pet. App. 5a-7a) affirming the judgment of the district court after remand is reported at 445 F.2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1971. A petition for rehearing or rehearing en banc was denied on September 16, 1971. On October 13, 1971, Mr. Justice Marshall extended petitioners' time within which to petition for a writ of certiorari until November 15, 1971. The petition was filed on November 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners' Fourth Amendment rights were violated by a search and seizure of corporate checks incident to a valid arrest prior to *Chimel* v. *California*, 395 U.S. 752.

2. Whether the court of appeals violated petitioners' right of due process by not reading the transcript of the suppression hearing or by not permitting oral argument.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners, father and son, were convicted of conspiracy and bribery of public officials in violation of 18 U.S.C. 371 and 201 (b). Petitioner Masiello Sr. was sentenced to five years' imprisonment and fined $15,000. Petitioner Masiello Jr. was sentenced to three years' imprisonment and fined $5,000. On appeal, the court of appeals remanded the case for a hearing on the reasonableness of a search and seizure which took place on March 19, 1969. 434 F.2d 33. Following an

evidentiary hearing on remand, the district court found the search reasonable. Gov't App. and 330 F. Supp. 1269. The court of appeals affirmed *per curiam*. 445 F.2d 1324.

The facts found by the district court showed that an indictment against petitioners, Thomas McKeever, and ANR Leasing Corporation was filed on March 19, 1969. Petitioner Masiello Sr. was the president and petitioner Masiello Jr. and McKeever were officers of the corporation, which leased trucks to the Post Office. The indictment charged that ANR and petitioners had bribed postal officials in order to get and maintain the department's business. A few weeks before the indictment was returned postal inspectors O'Neill and McFadden had learned of monetary bribes and gifts to postal employees, including payments on an automobile, and of payments to ANR by the department for trucks that were not used by it (H. 17-20, 122, 123, 234-235).[1]

At 10:45 a.m. on March 19, 1969, the indictment was filed and bench warrants for the arrest of the three men were requested because of petitioners' conviction record (H. 8, 11-13) (Gov't App. 10). The warrants were issued and Inspectors O'Neill and McFadden, along with two other postal officials and two United States marshals, went to the premises of ANR to execute them. They entered the office at 12:30 p.m., less than two hours after the warrants were issued (H. 22) (Gov't App. 11). McKeever was the

[1] "H." refers to the transcript of the hearing on the motion to suppress, a copy of which we are filing with the clerk of Court.

only person under indictment present, although a few employees were also there (H. 27) (Gov't App. 11). Inspector O'Neill testified that there was no attempt to time the arrests so as to be able to catch people on the premises and that he did not know who was inside when he entered the premises (H. 23). Inspector McFadden had reported to him before they entered that he thought he had seen petitioner Masiello Sr. at a restaurant across the street (H. 22-24). Petitioners were arrested a short time later outside the office (H. 13).

Incident to the arrest of McKeever the agents seized numerous items from the office of ANR, including 20,000 cancelled corporation checks.[2] Inspector O'Neill, who was looking specifically for four checks which had been used to pay postal employees, testified that he had attempted to find them but that there were too many checks to search through (Gov't App. 11-12). He testified that he had not asked the Treasurer of ANR, who was present, where they were because the treasurer was otherwise occupied with Inspector McFadden at the time (H. 57-59).[3]

ARGUMENT

1. Petitioners argue that, accepting as credible only the government's evidence, the court should have found the search invalid on the ground that the ar-

---

[2] McFadden testified that he had expected records to be seized and took three cartons with him in order to carry the records (H. 114-115).

[3] The nature of the records seized is more fully described in Gov't App. #. 11-12.

rest of McKeever was merely a pretext for the search. The arrest made under an indictment returned by the grand jury cannot be deemed a pretext. Inspector O'Neill testified that there was no attempt to time the arrests in order to insure that some one was on the premises. The fact that O'Neill may have decided in advance to search if an arrest occurred does not invalidate the search as a pretext. The right to search incident to arrest was established prior to *Chimel* v. *California*, 395 U.S. 752. That the agents hoped to be in a position to make use of that right does not establish any impropriety in attempting to arrest corporate officers charged with crime in the business premises of the corporation.

Petitioners also contend that the search incident to McKeever's arrest was too broad. However, the record shows that this case did not involve an indiscriminate search of the six-room premises for evidence of any possible crime. See *Kremen* v. *United States*, 353 U.S. 346; *Von Cleef* v. *New Jersey*, 395 U.S. 814. The evidence seized pertained to the bribery of postal officials and related matters involving ANR trucks and the post office. Many files were not searched or seized. No attempt was made to enter the office of petitioner Masiello, Sr. despite the fact that the agents had other information as to his involvement in loansharking (see H. 30-31, 49-54) (see generally Gov't App. 13). The search in this case was thus well within the limits for searches incident to arrest permitted prior to *Chimel* v. *California*, 395 U.S. 752. See *Harris* v. *United States*, 331 U.S. 145.

Petitioners also contend that the seizure of the cancelled checks was illegal, even if the search was legal. They base this contention on language in the court of appeals opinion (Pet. App. 6a) which termed the material seized "likely sources of admissible evidence of the crime." Petitioners argue that *Warden* v. *Hayden*, 387 U.S. 294, permits only the seizure of "evidence," not likely sources of evidence, and that the 20,000 checks, in 12 cartons, were merely likely sources. However, it is impossible to know with certainty whether property seized is in fact evidence of the crime; it is enough to justify the seizure that it probably is evidence. In this case that test was met. Agent O'Neill seized all 12 cartons of checks because he was unable on a quick search of them to find the four he was looking for (H. 57-58) (Gov't App. 11-12). The seizure of the 20,000 checks was justified to avoid the risk that the particular, incriminating checks might be destroyed by an employee. Cf. *Chambers* v. *Maroney*, 399 U.S. 42.

2. Petitioners also contend that the court of appeals denied them due process and the assistance of counsel by not permitting defense counsel to argue orally on appeal after the remand hearing and by not reviewing the transcript from the remand hearing. The thrust of their argument appears to be that, since the court of appeals had ordered the remand hearing, it was obligated to read the transcript. There is no merit to this argument. The court of appeals had before it the district court's findings and report on the reasonableness of the search (Gov't

App.). It was thus proper for the court of appeals to dispense with a second argument. See *Price* v. *Johnson*, 334 U.S. 266, 286.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Acting Assistant Attorney General.

EUGENE M. PROPPER,
Attorney.

DECEMBER 1971.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

69 Cr. 417

[Microfilm Jun. 25, 1970]

UNITED STATES OF AMERICA

v.

JOHN ANTHONY MASIELLO, ET AL., DEFENDANTS

APPEARANCES:

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Southern District of New York
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By: EDWARD M. SHAW
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Attorneys for Defendants

LASKER, D. J.

On January 20, 1970, defendants John Anthony Masiello and John A. Masiello, Jr., were convicted, after a trial by jury, of various violations of Title

18, U.S.C. § 210(b) and conspiring to commit such violations.

On March 19, 1969, a search and seizure had occurred incident to the arrest of co-defendant Thomas McKeever. A pretrial motion to suppress the evidence seized was denied by Judge Palmieri without a hearing. Certain checks taken during that search were introduced into evidence against the Masiellos and over their objections.

Defendants appealed their convictions, and on November 10, 1970, the Court of Appeals remanded the case for a hearing on the reasonableness of the search of March 19, 1969. The Court of Appeals found that there were "considerable discrepancies" between the affidavits of the government officers and that of an official of the corporation whose checks were seized as to what occurred during the search and seizure. The Court then observed:

> "It has been claimed that extensive portions of the enormous amounts of material seized have no possible relevance to the case at hand. It was further alleged that the federal officers conducted 'a general rummage of the suite and a wholesale seizure of the files and records contained therein.' If these characterizations of the facts are accurate, the activities of the federal officers could hardly be considered consistent with the requirements of the fourth amendment. See *Von Cleef* v. *New Jersey*, 395 U.S. 814 (1969) (per curiam); *Kremen* v. *United States*, 353 U.S. 346 (1957) (per curiam).
>
> "We therefore conclude that a hearing should be held and findings be made below on the extent and reasonableness of the search and seizure, and remand to request that Judge Lasker con-

duct such a hearing and report. We meanwhile retain jurisdiction of the appeal."

United States v. *John Anthony Mcsiello, et al,* (Slip Op. No. 97, Oct. 28, 1970).

The standards to be applied in determining the reasonableness of the search are those which existed prior to the ruling in *Chimel* v. *California,* 395 U.S. 752 (1969) (*Williams* v. *United States,* —— U.S. ——, Apr. 5, 1971).

I.

The hearing on remand was held on February 19 and February 22, 1971. The witnesses for the government included Edward J. O'Neill, John J. McFadden, and Frank J. Nemic, all of whom were postal inspectors in New York City on the date of the search. Witnesses for the defendants were Thomas Martin, an employee of A.N.R. Leasing Corporation at the time of the search, and Daniel Dillon, past secretary and employee of A.N.R. Leasing Corporation. On the basis of the testimony and the exhibits placed in evidence, I find the following facts:

O'Neill was in charge of the investigation of alleged bribery of postal officials by the defendants. At 10:45 A.M. on March 19, 1969, the indictment against defendants was filed. Knowing, as O'Neill did, before the handing down of the indictment, that John Masiello, Sr. had been convicted of smuggling, John Masiello, Jr. was under indictment for assault, and Thomas McKeever had been convicted of extortion, O'Neill and the Assistant United States Attorney in charge of the case requested bench warrants for the arrest of the Masiellos and McKeever. The

court issued the warrants.[1] At 12:30 Inspectors O'Neill, McFadden, Nemic and Myers arrived at the Masiello office, which was also the office of A.N.R. Leasing Corporation, controlled by the Masiellos, at 332 East 149th Street. They found McKeever on the premises and arrested him.

Prior to the time of the arrest, O'Neill had been informed by Andrew Daly, a postal employee, that A.N.R. Leasing and Coastwide Leasing had paid hotel bills for various postal employees and that the Masiellos had furnished him and another postal employee with free liquor and discount TV sets. In addition, one Bert Brodsky had informed O'Neill that John Masiello, Sr. had stated in his presence that Masiello or one of his companies had made payments on an automobile for Michael DeMasi, a postal employee, and that Masiello, Sr. had advised Masiello, Jr. to cancel further payments when DeMasi was no longer useful to A.N.R.

Accordingly, after the arrest of McKeever, O'Neill asked Thomas Martin, the A.N.R. bookkeeper, where the cancelled checks of A.N.R. and related companies were kept. In response Martin exhibited to O'Neill in room "C" 12 cartons of cancelled checks (each 5½" x 11" by 25") of A.N.R. and other Masiello companies, including Coastwide Leasing, Corporate Systems, Inc., and Set-Mar Holding Corporation, totaling approximately 20,000 checks. O'Neill looked through the checks to see if he could find those made to cover the hotel bills of postal employees or those for DeMasi's car or other payments to or for postal

[1] The arrest occurred after indictment and was lawful and with probable cause. Indeed, there seems to be no issue on this point. There is no indication that the question was raised by defendants before the Court of Appeals, nor was it included in the Court's mandate or in the defendants' briefs on remand.

employees, but, as he observed, "I looked, but there were so many checks that I just gave up." (Tr., p. 58). The checks were seized.

McFadden asked Martin to show him where the check stub books were. Martin produced nine such books from a file cabinet in his room, five for A.N.R., two for Set-Mar, one for Coastwide, and one for Corporate Systems.

The arresting officers also seized an A.N.R. cash receipts and disbursements book for the period 1966-1967. They did not take the volume covering the current period.

Bearing in mind the allegation that the Masiellos had been paying for DeMasi's car and that Brodsky had told Inspector Nemic that he believed A.N.R. was receiving payment for more vehicles than it was furnishing to the government, Inspector McFadden asked Martin for vehicle payment records. Martin produced 154 truck and vehicle booklets which were seized.

The last item seized was a purchase order book of A.N.R. found on Martin's desk. According to McFadden, this item was taken because "[w]e had prior to going to ANR's office, had learned from an employee in the garage that a damage claim filed by ANR Corporation had been questioned as to its validity, and he had gone to the invoice listed, new parts on the repair on ANR tractor. And the employee had gone to the company on which the invoice had been written and found that this coupon was among a number that had been missing from that office." (Tr., p. 100).

The inspectors had on hand in their cars unassembled cartons which were brought up to the office and assembled. The material seized was placed in the cartons and removed. A handwritten inventory of the

material taken was prepared in duplicate by the inspectors, signed by McFadder, and initialed on each page by Martin.

Substantial amounts of material on the premises were neither searched nor seized. The material not seized included the contents of four 4-drawer file cabinets in Martin's room, eight 4-drawer file cabinets in Alcove "D" which Dillon told O'Neill contained "motor vehicle records, bills, [and] invoices" and boxes of papers contained in room "C". No search or seizure was made in the room of John Masiello, Sr.

There is no dispute that the items designated above as seized were in fact taken by the government. There was sharp dispute at the hearing as to whether the government had in fact seized further items. Both defense witnesses testified that the inspectors took more records than listed in the signed inventory (GX 3), while the government witnesses testified that the list was complete. Martin asserted that a variety of documents other than those listed had been taken and that the inventory itself was not four but five or six pages in length.

Dillon did not participate in preparing the inventory, but "think[s] there were six or seven pages," never examined the document, but saw it laid out disarranged on Martin's desk and "doubt[s]" that there were only three to four pages. Martin admitted that he had received a copy of the inventory and delivered it to the Masiellos, but on the government's request the defendants were unable to produce their copy of the inventory or to explain its whereabouts or disappearance.

In the light of all the evidence of record, I find the testimony of the government witnesses as to the extent of the search credible and that of defense wit-

nesses untrustworthy, or, at the least, inaccurate and undependable.

II.

The issue to be determined is the reasonableness of the search and seizure as measured by the standards existing prior to *Chimel* v. *California*, supra. Those standards were spelled out in *United States* v. *Harris*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950).

The government contends that the search, incidental to a lawful arrest under warrant, was reasonable in scope under pre-*Chimel* standards. The defendants describe the search as "a general rummage of the suite and a wholesale seizure of the files and records contained therein," which cannot be sustained even under the criteria applicable prior to *Chimel*.

On the facts found above, it is concluded that the search, although admittedly involving substantial documentary material and several rooms of the A.N.R. office, was reasonable when measured by the applicable standards.

Defendants rely on three key decisions of the Supreme Court: *Kremen* v. *United States*, 353 U.S. 346 (1957); *Von Cleef* v. *New Jersey*, 395 U.S. 814 (1969), and *Vale* v. *Louisiana*, 399 U.S. 30 (1970).

In *Kremen*, the arresting officers searched the cabin where petitioners were found and seized its entire contents, removing them about 200 miles for the purpose of examination. The Court, in a brief per curiam opinion, found the search unreasonable. The brevity of the opinion limits its usefulness as a guide, but Justice Harlan's concurring opinion in *Von Cleef* (at 817) casts light in the dark corners, stating:

> "*Kremen* simply prohibits the police from seizing the entire contents of a building indiscrimi-

> nately, without considering whether the property they take is relevant to the crime under investigation; it does not bar the removal of all property that may reasonably be considered evidence of crime."

Here no such indiscriminateness occurred. The subject matter seized related to the charges in the indictment. All of the material taken was in a category relevant to the investigation. It is true that a substantially greater number of items—checks, for instance—than proved necessary to the trial were removed. However, these were seized because it was not practical for the inspectors, the defendants, or their agents, to ascertain within a reasonable time precisely which checks related to the offenses charged.

Von Cleef also involved a warrantless search incidental to an arrest. There the police searched the entire house and seized several thousand articles. The search was held unconstitutional under the pre-*Chimel*, *Rabinowitz* and *Harris* standards. But the indiscriminateness of the search in *Von Cleef* is illustrated by the opinion's description of it as "combing a three-story, 16-room house from top to bottom and carting away several thousand papers, publications and other items." In the instant case, the search did not involve a "combing" nor were the entire premises searched. While a good many items were removed, the categories of the material seized were discriminatingly determined and the search discriminatingly omitted various rooms, cabinets and desks. The inspectors searched only the rooms which the defendants or their agents specified to be those in which evidence relating to case was located, and only carefully selected material was removed.

In *Vale*, the defendant was arrested at the front steps of his house. Thereafter the arresting officers

searched the house itself and seized incriminating material. The search was held unreasonable. The case at hand is distinguished from *Vale* in several respects. In the first place, the *Vale* opinion held that the search was not incidental to an arrest because it did not occur on the premises searched. Here the arrest was made in the premises which were searched. Second, the *Vale* search was of a dwelling house. Here, as in *Rabinowitz*, where emphasis in *approving* the search was placed on the fact that the search was conducted in "a business room to which the public, including the officers, was invited," the search was of a business establishment. The significance of this point was confirmed by repetition in *Von Cleef*. Third, the *Vale* search was held not to be in the immediate vicinity of the arrest; but *Hill* v. *California*, —— U.S. —— (April 5, 1971), approved a search involving four separate rooms—similar to the instant case—apparently thereby finding such search to be "within the immediate vicinity of the arrest."

In the instant search the inspectors surely had probable cause to believe that they would discover documentary evidence of the crimes for which defendants had been indicted. Certain categories and only certain categories of material were seized. Those categories related clearly to the offenses charged.

Faced with the practical exigencies required by the review, for example, of 20,000 checks in order to find those relating to the crimes in question, and the risk that the items sought could be destroyed if left behind, the seizure was reasonable judged by the applicable pre-*Chimel* standards.

Defendants also contend that the government must show not only that the search was reasonable, but that it was not feasible to obtain a search warrant

under the circumstances existing at the time. However, the cases cited by defendants' counsel do not appear to support this proposition, and indeed the law, in the case of a search incident to a lawful arrest, is to the contrary. As the Court stated in *Cooper* v. *California*, 386 U.S. 58, 62 (1967) (quoting *United States* v. *Rabinowitz*, *supra*, 339 U.S. at 66):

> "It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'"

The Court of Appeals of this Circuit cited this passage as expressive of the law in *United States ex rel. Mahoney* v. *LaVallee*, 396 F.2d 887, 889 (1968), cert. den. 395 U.S. 985 (1969), remarking that ". . . we are reassured [by the Supreme Court's statement in *Cooper* v. *California*] that the Supreme Court still adheres to its pronouncement in *Rabinowitz*." This principle does not appear to have been altered by the *Chimel* decision (at least insofar as it applies to searches incident to arrest as there defined), but, in any event, clearly was the pre-*Chimel* standard as noted in the 1968 opinion in *Mahoney*, supra.

Upon the evidence of record I find that the search and seizure in the instant case were reasonable under applicable law.

Dated: New York, N. Y.
June 22, 1971

/s/ Morris E. Lasker
U.S.D.J.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 432886 393

SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-656

JOHN ANTHONY MASIELLO,
JOHN A. MASIELLO, JR.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1971

No. 71-656

John Anthony Masiello,
John A. Masiello, Jr.,

Petitioners,

—v.—

United States of America,

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The government's brief in opposition avoids or misconceives the basic points raised in the petition for a writ of certiorari. Worse, the government's brief ignores the crucial government testimony at the remand hearing on the motion to suppress which contradicts its position before this Court. This testimony is quoted and reviewed in our petition (pp. 7-12).[1] Instead, the government relies on the report opinion of the district court which also ignored this testimony. As argued in the petition, the misleading nature of the district court's opinion in this regard compounds the error of the court of appeals in not reviewing the extensive transcript of the remand hearing which it, itself, had ordered (pp. 23, 27-31).

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[1] A copy of the complete transcript of this hearing has been filed by the government with the clerk of Court.

I.

The government in response to the first argument in the petition that a search warrant was essential under the facts of this case, states, without the citation of any supporting authority, that a warrantless search may be made in connection with any arrest, even where the officers know weeks in advance the specific description of the items seized, their location and plan to seize them. This assertion by the government is contrary to the recent opinion of this Court in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) (Pet. 18).

The government gives no recognition to the holdings of this Court that warrantless searches are *per se* unreasonable, unless falling under certain exceptions supported by *exigent* circumstances. Although an arrest usually provides the exigent circumstances for a search incidental to it, this is not true where the arrest is used primarily as a search vehicle as in the instant case. As we pointed out in our petition (pp. 7-12), the government testimony at the remand hearing makes it abundantly clear that the arrest here was a pretext for the search and that no exigency permitting a warrantless search was present:

1. A six months' investigation had been completed;
2. A detailed indictment identifying the seized check payments had been returned;
3. Specific descriptions of the checks relevant to the indictment were possessed by the investigating government officers at least two months before the raid;
4. Postal Inspector O'Neill and Assistant United States Attorney Zirin planned prior to the indict-

ment to use an arrest warrant for the purpose of making a search incident to the arrest of any indicted defendant found on the business premises; and

5. Inspector McFadden was sent to the vicinity of the business offices to be raided in advance of the other officers (for no other explainable purpose than to spot the presence of an indicted defendant), and he took with him large empty boxes to carry back seized records.

Other than stating self-serving conclusions, the government completely fails to deal with this argument in its brief.

The government further misconceives our argument when it states that we "contend that the search incident to McKeever's arrest was too broad" (Gov't Br. 5). To the contrary, the petition clearly recognizes the pre-*Chimel* status of this case and specifically disclaims raising the issue of the scope of the search[2] and the application of this Court's decisions in *Kremen* v. *United States*, 353 U.S. 346 (1957); *Williams* v. *United States*, 401 U.S. 646 (1971) and *Hill* v. *California*, 401 U.S. 797 (1971) (Pet. 13-4). Rather, the petition pointedly states that the basic question is whether, under the factual circumstances of this case, there could be any search at all without a warrant (*Id.* at 14). Consequently, the government's motive in raising a straw issue and knocking it down is unclear.

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[2] The only reference in the petition to the scope of the search appears on page 22 where it is used to support the argument that the arrest was a pretext for the making of an exploratory search which would not have been permitted under a search warrant.

II.

The government also misapplies this Court's holding in *Warden* v. *Hayden,* 387 U.S. 294 (1967), in its effort to justify the court of appeals' improper extension of the mere evidence rule to include *likely sources of evidence* (Pet. App. 6a) (Gov't Br. 6). The court of appeals found it necessary to use this broadened concept, inconsistent with *Warden,* to uphold the seizure of a mass of 20,000 cancelled business checks in 12 cartons which had no appearance as evidence.

Actually, the government's brief ignores the court of appeals' standard of "likely sources of evidence", challenged by the petition. Instead, it discusses a different standard not relevant to this case. The government states that since "it is impossible to know with certainty whether property is in fact evidence of the crimes", it is enough if it "probably is evidence" (Gov't. Br. 6). Though this is an extremely loose approximation of the *Warden* rule, it has no application to the facts of this case. Under no circumstances could it be said that the mass of 20,000 cancelled business checks probably was evidence of crime. Indeed, this is why the court of appeals resorted to its much broader standard of "likely sources of evidence."

Also, the government adopts the same apology used by the district court for Agent O'Neill's seizure of 20,000 checks instead of the four he knew about. The government and the district court, with full knowledge of the remand hearing testimony, explain that the seizure of the 20,000 checks was necessary since Agent O'Neill "was unable on a quick search of them to find the four he was looking for"

(Gov't Br. 6, 8). This is patently implausible on the basis of O'Neill's own testimony at the remand hearing. He admitted knowing specifically the date, amount and payee of each of the checks he wanted long before the raid (Pet. 8-10). He need not have looked at 20,000 checks; he could have gone directly to the checks of the specific dates known to him and quickly collected the few he wanted by using the information about the payee and amounts also known to him.

Since the court of appeals did not review the transcript of the remand hearing, its opinion is based on the incomplete and inaccurate report opinion of the district court. There appears to be no justification for the government, which has filed a copy of the transcript of the remand hearing with the clerk of Court, to perpetuate this inaccuracy.

III.

The third argument of the petition dealing with the failure of the court of appeals to provide an opportunity for review of the remand hearing which it had ordered need not be repeated here. However, the government again misconceives our position since it assumes our complaint is the failure of the court of appeals to provide additional *oral* argument for counsel for petitioners. The petition makes it clear that the issue raised is the failure of the court of appeals, after the remand hearing, to have the expanded record brought before it and to afford counsel the opportunity to argue any new facts or issues produced by the remand hearing (Pet. 30). This argument could have been made orally *or* by brief.

Price v. *Johnson*, 334 U.S. 266 (1947), cited by the government as being contrary to our position is totally inapposite. It deals with the right of an appellate court to deny a prisoner's request to present his own oral argument in a postconviction remedy procedure. The instant case involves the original appeal from a criminal conviction. The court of appeals ordered the remand hearing since it could not resolve the important issues of Fourth Amendment rights because the motion to suppress had been denied without a hearing.

Thus, the court of appeals was without a complete record on appeal. Once the remand hearing was held, there was a completed record which would have permitted the court of appeals to conclude its appellate review. Since the case was but an interrupted appeal, an adversary proceeding at which to present these new facts was as necessary as the initial appellate proceedings before the court. Instead the court of appeals affirmed only on the basis of a deficient report of this remand hearing by the district court without reviewing the completed record or giving counsel an opportunity to present new arguments orally or by brief.

The government has failed to respond to this basic argument.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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